

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

FOR MR. JUSTICE ROBB.

TRANSCRIPT OF RECORD

COURT OF APPEALS, DISTRICT OF COLUMBIA

JANUARY TERM, 1930

No. 5152

SPECIAL CALENDAR

821

J. R. McCARL, COMPTROLLER GENERAL OF THE UNITED STATES, AND ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, APPELLANTS

VS.

UNITED STATES EX RELATIONE EDMUND F. LELAND

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED FEBRUARY 20, 1930

May 5, 1930

W. R. Van O.

COURT OF APPEALS, DISTRICT OF COLUMBIA

JANUARY TERM, 1930

No. 5152

J. R. McCARL, COMPTROLLER GENERAL OF THE UNITED STATES, AND ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, APPELLANTS,

vs.

UNITED STATES EX RELATIONE EDMUND F. LELAND, APPELLEE

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

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Supreme Court of the District of Columbia

UNITED STATES EX RELATIONE EDMUND F.
Leland, petitioner
vs.

J. R. McCARL, COMPTROLLER GENERAL OF THE
United States, and Robert H. Lucas, Commis-
sioner of Internal Revenue, respondents

At Law No. 77256

UNITED STATES OF AMERICA,

District of Columbia, ss:

Be it remembered that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 In the Supreme Court of the District of Columbia
Holding a Circuit Court

UNITED STATES EX RELATIONE EDMUND F.
Leland, petitioner
vs.

J. R. McCARL, COMPTROLLER GENERAL OF THE
United States, and Robert H. Lucas, Commis-
sioner of Internal Revenue, respondents

At Law No. 77256

Petition for writ of mandamus

Filed Oct. 7, 1929

Edmund F. Leland (hereinafter referred to as the taxpayer) respectfully represents to the court as follows:

1. He is a citizen of the United States and a resident of Massachusetts.

2. The respondent, J. R. McCarl, is Comptroller General of the United States and head of the General Accounting Office, and the respondent, Robert H. Lucas, is Commissioner of Internal Revenue of the United States, both the said respondents being sued in their official capacities.

3. On March 30, 1926, in a letter bearing that date (a true copy of which is marked "Exhibit A" and is attached hereto and made a part of this petition), the then Commissioner of Internal Revenue sent by registered mail to the taxpayer notice that he, the said commissioner, had determined a deficiency in the taxpayer's income tax for 1916 in the amount of \$60,190.16 and proposed to assess the same against the taxpayer.

4. On May 27, 1926, and within sixty days after March 30, 1926, the taxpayer duly filed with the United States Board of Tax Appeals a petition for redetermination by the board of the deficiency proposed by the said commissioner, which petition is still pending before that board under its docket number 16474, no decision, final or otherwise, having yet been rendered thereon. No part of the said proposed deficiency has been assessed, and no bill therefor or

for any part thereof has been received from the Collector of Internal Revenue.

5. Section 284 (a) of the revenue act of 1926 (44 Stat. 66) provides as follows:

"Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this act, the act entitled 'An act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the act entitled 'An act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' approved October 3, 1913, the revenue act of 1916, the revenue act of 1917, the revenue act of 1918, the revenue act of 1921, or the revenue act of 1924, or any such act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then ~~due from the taxpayer~~, and any balance of such excess shall be re-funded immediately to the taxpayer."

The exception in subdivision (d) referred to above is not material in the present case.

6. Section 3220 of the Revised Statutes, as amended by section 3 of Public, No. 611, 70th Congress, approved May 29, 1928 (45 Stat. 996), provides as follows:

"Refundments: taxes and penalties.—The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him, with the cost and expense of suit; also all damages and cost recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, if any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report in Congress, by internal-revenue districts and alphabetically arranged of all refunds in of \$500, at the beginning of each regular session of Congress of all transactions under this section."

3 7. In said letter of March 30, 1926, the said Commissioner of Internal Revenue also determined that there had been an overassessment of taxpayer's income tax for 1919 in the amount of \$30,828.43.

8. Thereafter, and in accordance with the statutes and regulations, the respondent commissioner listed the said overassessment of \$30,828.43 as an overassessment in column 3 on a Schedule of Overassessments, Abatements, Credits and Refunds, which petitioner is advised and believes was numbered IT-35254, and on or about July 26, 1929, signed the following "Authorization of Commissioner" on said Schedule —

"AUTHORIZATION OF COMMISSIONER

"This schedule must be adjusted and all required steps taken immediately. The amounts listed in column 3 as overassessments (or

reductions of tax liability) are hereby approved and allowed in the respective amounts indicated, if any.

"The collector will immediately check such items against the accounts of the taxpayers and determine whether the amounts in which the tax liabilities have been reduced should be respectively abated in whole, or in part, and make such abatements as may be warranted by the condition of the taxpayer's accounts for the years involved. If any part of any such items is found to be an overpayment, the collector will examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against income, war profits, or excess profits taxes due, if any, making the appropriate entries in his accounts. The amounts credited will be entered by the collector in column 6. The balance, if any, of the overpayment refundable will be entered in column 7 and an appropriate memorandum made upon the taxpayer's account showing the refund and the amount refunded. The collector will thereupon complete and certify this schedule and return the same, with the necessary copies, to the Commissioner of Internal Revenue.

"The Deputy Commissioner of Internal Revenue will compute the interest payable, list the same in column 8, and enter the respective total amounts payable in column 9 or 10, or both.

"The disbursing clerk, treasury Department, is authorized to pay the amounts specified in column 9 or 10, or both."

9. The said schedule was thereupon, at the direction of the respondent commissioner and in due course, transmitted to the collector of internal revenue for the district in which this taxpayer resides and has made his returns, and to the deputy commissioner. The collector after examination of the taxpayer's accounts completed the schedule by entering the entire \$30,828.43 as a net amount refundable in column 7 and certified the schedule back to the respondent commissioner. The deputy commissioner computed interest thereon under section 614 of the revenue act of 1928 (45 Stat. 876) in the amount of \$16,491.95 and listed that amount in column 6 and entered the total of the two amounts (viz, \$47,320.38) in column 9 or 10 as the "Amount to be paid" to the taxpayer.

10. The said schedule or voucher on the proper form ("Form 7930, Treasury Department, * * * approved by Comptroller General U. S. September 21, 1926") and properly prepared and certified was then in the customary and proper manner transmitted by the respondent commissioner on or about September 4, 1929, to the General Accounting Office, whose duty was, under the circumstances stated, to certify or countersign said schedule or voucher for payment out of the appropriations available for refund of taxes illegally or erroneously collected.

11. The General Accounting Office examined the said schedule or voucher but the said office and the respondent Comptroller General refused to certify or countersign such schedule or voucher for payment, and on or about September 6, 1929, returned the same to the office of the Commissioner of Internal Revenue.

12. The said schedule or voucher is now in the custody of the office of respondent commissioner, and under his control and supervision, and has not been transmitted to the disbursing clerk for payment, and although in behalf of taxpayer request and demand has been made

for such action, the respondent commissioner refuses to take any further action to cause the payment of said refund allowance and lawful interest to the taxpayer.

13. Your relator avers that he has taken all steps and done all things necessary or proper to cause the said respondents and each of them to take such action as might effect the payment to taxpayer of the said refund allowance and lawful interest thereon.

14. Your relator further avers that the purpose and intent of Congress, as expressed in section 284 of the revenue act of 1926, and in section 3220 of the Revised Statutes, as amended, was to authorize and empower the Commissioner of Internal Revenue to immediately refund all overpayments of income tax when found to be in excess of any unpaid income, war-profits or excess profits taxes for any other year then due from the same taxpayer; that neither the General Accounting Office nor the Comptroller General of the

5 United States is authorized to review or set aside the findings or allowances or decisions of the Commissioner of Internal Revenue in said regard as the former have undertaken to do in this case; that the sole duty of the General Accounting Office and of said Comptroller General, under the circumstances of this case, was and is the ministerial one of certifying or countersigning the aforesaid schedule of voucher for payment; and that the taxpayer relator has no other adequate remedy at law for the wrongs and injuries here complained of.

Wherefore, the premises being considered, the petitioner prays:

1. That a rule may issue directing the respondent, Robert H. Lucas, as Commissioner of Internal Revenue, to appear before this honorable court and show cause, if any there be, why a writ of mandamus should not be issued commanding and directing him, after recomputing interest according to law, to retransmit said schedule or voucher, allowing your relator said tax refund of \$30,828.43, together with lawful interest thereon, to the General Accounting Office for certification and to the disbursing clerk, Treasury Department, for payment, and further commanding and directing him to do all acts and things necessary or proper to cause the immediate payment of said tax refund and lawful interest to your relator.

2. That a writ of mandamus may issue to said respondent, Robert H. Lucas, as Commissioner of Internal Revenue, commanding and directing him, after recomputing interest according to law, to retransmit said schedule or voucher, allowing your relator said tax refund of \$30,828.43, together with lawful interest thereon, to the General Accounting Office for certification and to the disbursing clerk, Treasury Department, for payment, and further commanding and directing him to do all acts and things necessary or proper to cause the immediate payment of said tax refund and lawful interest to your relator.

3. That a rule may issue directing the respondent J. R. McCarl, as Comptroller General of the United States and as head of the General Accounting Office, to appear before this honorable court and show cause, if any there be, why a writ of mandamus should
6 not be issued commanding and directing him, upon again receiving said schedule or vouched allowing your relator said tax refund of \$30,828.43, together with lawful interest, to certify and

countersign the same for payment, and further commanding and directing him to do all acts and things necessary or proper to cause the immediate payment of said tax refund and lawful interest to your relator.

4. That a writ of mandamus may issue to said respondent, J. R. McCarl, as Comptroller General of the United States and as head of the General Accounting Office, commanding and directing him, upon again receiving said schedule or voucher allowing your relator said tax refund of \$30,828.43, together with lawful interest, to certify and countersign the same for payment, and further commanding and directing him to do all acts and things necessary or proper to cause the immediate payment of said tax refund and lawful interest to your relator.

5. For such other and further relief as the nature of the petition may require.

EDMUND F. LELAND,
By JAMES CRAIG PEACOCK,
JOHN W. TOWNSEND,

*Attorneys for Relator, 1366 National Press Building,
Washington, D. C.*

DISTRICT OF COLUMBIA, ss:

James Craig Peacock, being duly sworn, deposes and says that he is one of the attorneys in and personally familiar with this matter; that he has read the foregoing petition and knows the contents thereof; and that the facts are true to the best of his knowledge, information, and belief.

JAMES CRAIG PEACOCK.

Subscribed and sworn to before me this 5th day of October, 1929.

[NOTARIAL SEAL]

MARGUERITE G. DAVIS,
Notary Public.

7

EXHIBIT A

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Mar. 30, 1926.

IT:PA:PYA.
ARM.

Mr. EDMUND F. LELAND,
*273 Summer Street,
Boston, Massachusetts.*

SIR: The determination of your income tax liability for the years 1918 and 1919, as set forth in office letter dated January 15, 1924, disclosing an aggregate deficiency in tax amounting to \$134,970.28, has been changed as the result of your protest and the protest on the partnership of Brown and Adams, to disclose a deficiency in tax of \$60,190.16 for 1918 and an overassessment of \$30,828.43 for 1919, as shown in the attached statement.

In accordance with the provisions of section 274 of the revenue act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file an appeal contest in whole or in part the correctness of this determination. Any such appeal must

be addressed to the United States Board of Tax Appeals, Washington, D. C., and must be mailed in time to reach that board within the 60-day period.

Where a taxpayer has been given an opportunity to appeal to the Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:PYA:ARM. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR,
By _____,
Assistant to the Commissioner.

8

Statement

IT:PA:PYA-60D

ARM

MAR. 30, 1926.

In re: Mr. Edmund F. Leland, 275 Summer Street, Boston, Massachusetts.

	Deficiency in tax	Overassess- ment
1919-----	(waiver on file)-----	\$30. 828. 43
1918-----	\$60. 190. 16 (waiver on file)-----	

A reaudit of your returns, in connection with your protest and information received in conferences dated May 22 and June 5, 1924, and April 15, 1925, on the partnership of Brown and Adams, discloses the following adjustments:

It has been held by this office that the amount of \$275,345.12, included in the partnership returns in an account captioned "Whom it may concern," was rightfully included therein pending a decision by the District Court of Boston.

However, they have been allowed to deduct the script of \$21,750 from their 1919 return, putting this in 1918 and deducting \$18,770, the amount included by the revenue agent as income for this year, this amount being already included as income for 1917.

They have also been allowed the deduction of \$1,215 as additional salaries paid for 1918.

A synopsis of your returns as corrected follows:

1918

For the year 1918 you have been allowed the loss on the sale of securities of \$39,204.86 as claimed, instead of a gain of \$2,183.49 as disclosed by the revenue agent's report.

Loss—Block A	\$7,674.90
Income—Block B	22,000.00
Block C, adjusted	576,016.07
Loss—Block D, adjusted	39,204.86
Loss—Block E	222.44
Income—Block F	2,187.50
Income—Block G	6,389.43
Gross income	559,490.80
foc. lob. 3.	
9 Forward	\$559,490.80
Block I	6,254.96
Net income subject to normal tax	553,235.84
Block K(a) and K(b)	20,650.91
Corrected net income	573,886.75
Loss:	
Block K(a) and K(b)	\$20,850.91
Personal exemption	2,600.00
	23,250.91
Amount subject to normal tax	550,635.84
Amount subject to normal tax at 6%	4,000.00
Amount subject to normal tax at 12%	546,635.84
Normal tax at 6%	240.00
Normal tax at 12%	65,596.30
Surtax	310,797.52
Total	376,633.82
Loss: Tax paid at source	43.75
Correct tax liability	376,590.07
Originally assessed	316,399.91
Deficiency in tax	60,190.16

1919

For the year 1919 you have been allowed the loss on the sale of securities of \$9,302.80 as claimed in your protest; also the gain of \$814.83 on the sale of real estate as computed by the revenue agent has been eliminated in this adjustment.

Since the partnership of Adams and Leland filed their returns on a fiscal year basis, the income for the period ending March 31, 1920, has been included as income for 1920 as well as for the period ending December 31, 1920.

Loss—Block A	\$7,743.18
Income—Block C	76,668.16
Loss—Block D	14,286.15
Loss—Block E	121.36
Income—Block F	4,300.00
Income—Block G	8,613.08
Block H	67,431.55
foc. lob. 3.	

98243—30—2

over

10	Forward.....	\$67,431.55
	Block I.....	8,840.53
	Corrected net income.....	58,583.02
	Plus: Block K (a) and K (b).....	18,986.36
	Income subject to surtax.....	77,569.38
	Normal tax at 4%.....	160.00
	Normal tax at 8%.....	4,158.64
	Surtax.....	13,890.67
	Total.....	18,209.31
	Less tax paid at source.....	86.00
	Correct tax liability.....	18,123.31
	Originally assessed.....	48,951.74
	Overassessment.....	30,828.43

For the year 1920 there is a deficit; therefore, no tax due for this year.

Payment of the deficiency in tax should not be made until a bill is received from the collector of internal revenue for your district and remittance should then be made to him.

The overassessment shown herein will be made the subject of a certificate of overassessment which will reach you in due course through the office of the collector of internal revenue for your district. If the tax in question has not been paid the amount will be abated by the collector. If the tax has been paid the amount of the overpayment will first be credited against unpaid income tax for another year or years, and the balance, if any, will be refunded to you by check of the Treasury Department. It will thus be seen that the overassessment does not indicate the amount which will be credited or refunded since a portion may be an assessment which has been entered but not paid.

The appeal referred to applies only to deficiency in tax, as the revenue act of 1926 does not provide for appeals on overassessment.

11 *Rule to show cause*

Filed Oct. 7, 1929

* * * * *

Upon consideration of the petition of United States ex relatione Edmund F. Leland, filed in the above-entitled cause on the 7th day of October, 1929, it is by the court this 7th day of October, 1929,

Ordered that the respondents, Robert H. Lucas, as Commissioner of Internal Revenue, and J. R. McCarl, as Comptroller General of the United States and head of the General Accounting Office, appear in this court at ten o'clock a. m., on the 1st day of November, 1929, and show cause, if any there be, why the prayers of said petitioner should not be granted and a writ of mandamus issued as therein prayed; provided, however, a copy of this order be served upon each of said respondents on or before the 11th day of October, 1929.

By the court:

JENNINGS BAILEY, *Justice.*

Marshal's return

Served a copy of the within rule on Robert E. Lucas, Com. of Internal Revenue, 10-8-29, and J. R. McCarl, Comp. General, each personally.

EDGAR C. SNYDER,
U. S. marshal in and for the Dist. of Columbia,
By HARRY C. ALLEN,
Deputy U. S. marshal,
JOHN KAPP,
Deputy.

(K)

12 *Separate answer of the Comptroller General of the United States to the rule to show cause and to the petition*

Filed Oct. 23, 1929

Now comes J. R. McCarl, Comptroller General of the United States, and reserving unto himself the benefits of all objections and exceptions to the errors and insufficiencies of the petition filed herein, including the lack of proper and indispensable parties respondent and to the lack of jurisdiction appearing upon the face of the petition to grant the prayers thereof, nevertheless files this as his separate answer to the rule to show cause and to the allegations in the petition as he is advised it is material and necessary for him to make answer unto, and says:

1-8

That he admits, upon information and belief, the averments of paragraphs 1 to 8, inclusive, of the petition, but as a further answer thereto invites attention of the court to section 273 of the revenue act of 1926, 44 Stat. 55, 57, which provides, in effect, that when the Commissioner of Internal Revenue determines that there is a deficiency between the taxes paid and the taxes legally and properly chargeable to a taxpayer, said commissioner shall give written notice thereof to the taxpayer who may, within 60 days, file a petition in the Board of Tax Appeals for redetermination of the deficiency in taxes and that pending the hearing of the petition:

" * * * no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the board, until the decision of the board has become final. * * * "

For further answer this respondent says that under the law the findings and decisions of the Commissioner of Internal Revenue are *prima facie* correct; that the tax account between the United States and the taxpayer with respect to the matter of collection and refund of axes is an entirety; that the statute quoted in paragraph 6 of the petition does not require this respondent to certify or approve a claim for refund of taxes to a taxpayer overpaid for one

tax year when the Commissioner of Internal Revenue has determined that there is a deficiency in the taxes paid by the same taxpayer for a tax year in excess of the amount of the refund; and that the restraint imposed in section 273 of the Revenue Act of 1926, *supra*, against proceedings to collect a deficiency in taxes determined by the Commissioner of Internal Revenue pending decision of the Board of Tax Appeals, does not impose on the United States either a legal or equitable obligation to pay over to a taxpayer any sums pending the determination, as provided by law, of the correctness of the deficiency in taxes concerning notice of which has been given by the Commissioner of Internal Revenue.

14

9-13

This respondent admits, in so far as they relate to him, the facts alleged in paragraphs 9 to 13, inclusive, of the petition, except the averment, which is denied, that it is the duty of the General Accounting Office under his direction to "certify or countersign said schedule or voucher for payment out of the appropriation available for refund of taxes illegally or erroneously collected." As a further answer thereto this respondent says that the Commissioner of Internal Revenue by letter dated September 4, 1929, a copy of which is hereto annexed as Exhibit A, in forwarding for preaudit a voucher stated in favor of the relator for \$30,828.43 overpaid taxes for the tax year 1919, reported, in effect, that he had determined the relator had underpaid his taxes in the sum of \$60,190.16 for the tax year 1918 and that a proposed deficiency assessment of taxes in said amount against the relator had become the subject of a petition to the United States Board of Tax Appeals.

In further answer this respondent says that under the law, including sections 492, et seq., title 31, U. S. Code, disbursing officers of the Government are permitted to make expenditures in payment of legal obligations of the United States; that they are chargeable on their bonded and personal responsibility with the amount of any erroneous or illegal payments made by them; that as an aid and protection to disbursing officers of the United States, including the disbursing clerk of the Treasury Department, who ordinarily makes payment by check drawn on the Treasurer of the United States of taxes approved for refund by the Commissioner of Internal Revenue and to the United States, it is the procedure to audit and examine such vouchers in the General Accounting

15 Office before they are transmitted to the disbursing clerk of the Treasury Department for payment; that the refusal of this respondent to certify or approve the voucher for payment by the disbursing clerk from general appropriations made for the refund of taxes was notice to all concerned that this respondent would not allow credit in the accounts of the disbursing clerk for any payment in refund of taxes to a taxpayer who was *prima facie* indebted to the United States on the determination of the Commissioner of Internal Revenue for deficiency in taxes for other tax years in excess of the amount of the proposed refund.

This respondent further shows to the court that the petitioner is in no manner injured by such procedure for the reason that in

event the deficiency in taxes is not upheld by the Board of Tax Appeals, and there is a refund of taxes payable to the relator, said relator is entitled under section 1116 of the revenue act of 1926, 44 Stat. 119, to interest at the rate of six per centum per annum from the date such tax was paid to the Government to a date not more than thirty days from the date of the refund, or in case the refund is used as a credit against any deficiency upheld by the Board of Tax Appeals to the due date of the deficiency. Furthermore, the public interests will be protected in the meantime to the extent of the refund of taxes due in event the relator should become unable for any reason to pay the deficiency in taxes in event the deficiency is finally upheld by the board and the courts as provided in the law.

14

This respondent is advised that the averments of paragraph 14 are not averments of fact but conclusions of the pleader, which this respondent is not required to answer.

16 Wherefore this respondent, having fully answered the rule to show cause and the petition, insists that the matters and things therein set forth require the exercise of judgment and discretion of this respondent, and that in all things he has performed no act which should lead the court to interfere therewith by granting the prayers of the petition. He, therefore, prays that the rule be discharged and the petition dismissed and that he shall have his costs.

J. R. McCARL,
Comptroller General of the United States.

LEO A. ROVER,
United States Attorney.

JOHN W. FIELLY,
Assistant United States Attorney.

R. L. GOLZE,
General Counsel,

O. R. McGUIRE,
Attorney,
Attorneys for Respondent Comptroller
General of the United States.

DISTRICT OF COLUMBIA, ss:

J. R. McCarl, Comptroller General of the United States, being first duly sworn, deposes and says that he has read the foregoing answer by him subscribed and knows the contents thereof;
17 that the facts therein stated upon personal knowledge are true; and that those set forth upon his information and belief are believed to be true.

J. R. McCALL,
Comptroller General of the United States.

Subscribed and sworn to before me this 23d day of October, A. D. 1929.

[NOTARIAL SEAL.]

A. R. GARD, *Notary Public.*

18 (Copy)

IT: C: CC: JRB.

SEPTEMBER 4, 1929.

The COMPTROLLER GENERAL OF THE UNITED STATES,
General Accounting Office.

SIR: Forwarded herewith for preaudit is IT:35274 listing over-assessments certified for refund by the collector of internal revenue, Boston, Massachusetts, for the year 1929 on behalf of the following taxpayers in the sums indicated:

	1919 overassessment
Samuel G. Adams.....	\$31, 218. 09
Harry P. Bradford.....	10, 985. 57
Jacob F. Brown.....	73, 589. 75
Harold M. Cummings.....	4, 213. 78
Albert T. Howe.....	34, 481. 04
Edmund F. Leland.....	30, 828. 43

Proposed deficiency taxes against the taxpayers for the year 1918 which have become the subject of petitions to the United States Board of Tax Appeals are as follows:

	1918 deficiency
Samuel G. Adams.....	\$58, 479. 94
Harry P. Bradford.....	31, 740. 50
Jacob F. Brown.....	158, 824. 60
Harold M. Cummings.....	17, 687. 61
Albert T. Howe.....	58, 489. 69
Edmund F. Leland.....	60, 190. 16

By direction of the commissioner.

Very respectfully,

_____, *Deputy Commissioner.*

AF

19 *Separate answer of the Commissioner of Internal Revenue, Treasury Department, to the rule to show cause and to the petition*

Filed Oct. 30, 1929

Now comes Robert H. Lucas, Commissioner of Internal Revenue, Treasury Department, and reserving unto himself the benefits of all objections and exceptions to the errors and insufficiencies of the petition filed herein, including the lack of proper and indispensable parties respondent and to the lack of jurisdiction appearing upon the face of the petition to grant the prayers thereof, nevertheless files this as his separate answer to the rule to show cause and to the allegations in the petition, as he is advised it is material and necessary for him to make answer unto, and says that he denies each and every allegation of the petition except as hereinafter specifically admitted.

20

1-9

This respondent admits the allegations of paragraphs 1 to 9, inclusive, of the petition, and as further answer thereto says that the petition of the relator for redetermination by the Board of Tax Appeals of the deficiency assessment of taxes proposed by the Commissioner of Internal Revenue is now pending undecided, as docket No. 16474 before the said Board of Tax Appeals.

10

This respondent admits that a schedule or voucher in proper form 7930 was properly prepared and approved in the principal sum of \$30,828.43, with interest of \$16,491.95, as refund of taxes to the relator for the tax year 1919, and was submitted by the Bureau of Internal Revenue in the usual course of business by letter dated September 4, 1929 (copy of which is annexed to the separate answer of respondent Comptroller General as Exhibit A), to the General Accounting Office, where, under the procedure in effect, the said voucher was subject to audit before payment by the disbursing clerk of the Treasury Department to whom, in ordinary course, similar vouchers, when they have received the preaudit approval of the General Accounting Office, are forwarded for payment from such appropriations, if any, as are available for refund of taxes illegally or erroneously collected.

11

The General Accounting Office, under the direction of the respondent Comptroller General, returned the said schedule or voucher to the Bureau of Internal Revenue without the preaudit approval of the General Accounting Office.

21

12

This respondent admits that the said schedule or voucher is now in the custody of the office of the respondent commissioner, and under his control and supervision, and that it has not been transmitted to the disbursing clerk of the Treasury Department for payment. It is further admitted that the relator has requested and demanded that such voucher be transmitted to the disbursing clerk of the Treasury Department for payment, but this action has been refused for the reason that the voucher did not show the preaudit of the General Accounting Office. As a further answer, the respondent alleges that he is not a disbursing clerk of the United States authorized to draw checks on the Treasury of the United States in payment of refund of taxes or for any other purpose, and that the payment of claims for refund of taxes allowed and approved by this respondent are for payment either by the disbursing clerk of the Treasury Department, who is not subject to the directions or the control of this respondent or by the Treasurer of the United States on certificates of settlement issued by the General Accounting Office, and that neither the Treasurer of the United States nor the General Accounting Office are subject to the direction or control of this respondent. As an affirmative defense, this respondent alleges that he has taken all action authorized by law for him to take when he approved the claim for refund of taxes to the relator for the tax year 1919 and served notice on the relator of a deficiency assessment of taxes for the tax year 1918, which was made the subject of a petition to the Board of Tax Appeals, as afore-said.

This respondent admits the allegations of paragraph 13 of the petition.

This respondent is advised that the allegations of paragraph 14 of the petition are not allegations of fact but conclusion of the pleader and that he is not required to make answer thereto.

Wherefore this respondent having fully answered the rule to show cause of the petition, prays that the rule be discharged and the petition dismissed as to him.

ROBERT H. LUCAS,
Commissioner of Internal Revenue.

LEO A. ROVER,
United States Attorney.

JOHN H. FIDELLY,
Assistant United States Attorney.

HARRISON MCCONNELL,
*Attorney General Counsel's Office,
Attorneys for Respondent Lucas.*

DISTRICT OF COLUMBIA, ss:

Robert H. Lucas, Commissioner of Internal Revenue, being first duly sworn, deposes and says that he has read the foregoing answer by him subscribed and knows the contents thereof; that the facts therein stated upon personal knowledge are true; and that those set forth upon his information and belief are believed to be true.

ROBERT H. LUCAS,
Commissioner of Internal Revenue.

23 Subscribed and sworn to before me this 25th day of October,
A. D. 1929.

[NOTARIAL SEAL.]

IRA Y. BAIN, *Notary Public.*

My commission expires Feb. 7th, 1932.

24 *Petitioner's demurrer to the separate answer of the
respondent Comptroller General*

Filed Nov. 2, 1929

The petitioner says that the separate answer of the respondent Comptroller General is bad in substance for the following reasons:

1. The Commissioner of Internal Revenue is the final judge in the administrative branch of the Government to decide that an overpayment of income tax has been made and that a refund should be granted.

2. The authorization to the disbursing clerk signed by the commissioner in the present case was conclusive, and the Comptroller General was not authorized to review it, his duty to certify or approve such voucher for payment by the disbursing clerk, when in due form and drawn upon an applicable appropriation, being ministerial and enforceable by mandamus.

3. The said authorization by the commissioner was in accordance with the applicable provisions of the statutes and particularly of section 284 (a) of the revenue act of 1926.

4. Under the applicable provisions of the statutes, and particularly section 284 (a) of the revenue act of 1926, a taxpayer is entitled to receive payment of a duly authorized refund, notwithstanding that there may be pending in the Board of Tax Appeals an undetermined appeal by him from a proposed assessment of additional taxes for another year.

25 5. The respondent's answer is argumentative and directed to what he apparently thinks should have been the policy of Congress instead of to the effect of the statutes which Congress did enact.

6. The answer sets forth no matter of fact or of law constituting a sufficient defense to the prayers of the petition.

JAMES CRAIG PEACOCK,
JOHN W. TOWNSEND,
Attorneys for Petitioner.

Notice

TO LEO A. ROVER, JOHN W. FIDELLY, R. L. GOLZE, and O. R. McQUIRE, Esquires,
Attorneys for Respondent Comptroller General of the United States.

SIRS: Please take notice that the foregoing demurrer will be for hearing before Mr. Justice Bailey in Circuit Court No. 2, on Friday, November 8, 1929, at ten o'clock a. m., or as soon thereafter as counsel may be heard.

JAMES CRAIG PEACOCK,
JOHN W. TOWNSEND,
Attorneys for Petitioner.

Service of copy of the foregoing is acknowledged this 2d day of November, 1929.

LEO A. ROVER,
U. S. Attorney.

26 *Petitioner's demurrer to the separate answer of the respondent Commissioner of Internal Revenue*

Filed Nov. 2, 1929

The petitioner says that the separate answer of the respondent Commissioner of Internal Revenue is bad in substance for the following reason:

1. The answer sets forth no reason why the respondent commissioner should not, after recomputing interest according to law, retransmit the schedule for voucher (allowing the relator the tax refund of \$30,828.43, together with lawful interest thereon) to the General Accounting Office for certification or approval, and to the disbursing clerk, Treasury Department, for payment.

JAMES CRAIG PEACOCK,
JOHN W. TOWNSEND,
Attorneys for Petitioner.

27 *Notice*

To LEO A. ROVER, JOHN H. FIDELLY, and HARRISON McCONNELL,
Esquires,
Attorneys for Respondent Commissioner of Internal Revenue.

SIRS: Please take notice that the foregoing demurrer will be for hearing before Mr. Justice Bailey in Circuit Court No. 2, on Friday, November 6, 1929, at 10 o'clock a. m., or as soon thereafter as counsel may be heard.

JAMES CRAIG PEACOCK,
JOHN W. TOWNSEND,
Attorneys for Petitioner.

Service of copy of the foregoing is acknowledged this 2d day of November, 1929.

LEO A. ROVER,
U. S. Attorney.

28 *Memorandum opinion*

Filed Dec. 31, 1929

* * * * *

Where the language of a statute is unambiguous, its natural and plain meaning must be followed, even though it produce a result contrary to some extent to the interests of the United States and favorable to a taxpayer. Under the statute applicable to this case the duties of the respondents are ministerial in their nature and the petitioner is entitled to have them performed. The demurrers to the answer of the respondents will be sustained.

BAILEY, J.

SUPREME COURT OF THE DISTRICT OF COLUMBIA

FRIDAY, *January 10th, 1930.*

Session resumed pursuant to adjournment, Hon. Jennings Bailey, Justice, presiding.

* * * * *

This cause came on heretofore for hearing upon the petition filed, the rule to show cause issued, the separate answers of respondents and the demurrers filed to said answers, and after argument thereon by attorneys of record for the respective parties, was submitted to the court.

Whereupon, this cause having been considered by the court, it is ordered that the said demurrers be, and the same are hereby, severally sustained to the aforesaid answers.

Thereupon the respondents elect to stand upon their respective answers, whereupon judgment is ordered.

29 Wherefore it is adjudged and ordered that the prayers of the petition be, and the same are hereby granted, and that the peremptory writ of mandamus do forthwith issue herein, as in said petition prayed, and it is considered that petitioner recover of

respondents his costs of suit, to be taxed by the clerk and have execution thereof.

From the foregoing judgment the respondents, by their said attorneys, in open court, note an appeal to the Court of Appeals.

30

Assignment of error

Filed Jan. 10, 1930

Comes now the respondents by their attorneys and for their assignments of error on appeal to the Court of Appeals of the District of Columbia set forth the following:

1. The court erred in sustaining the demurrer to the answers and in entering final order granting the writ of mandamus as prayed for in the position.

2. The court erred in other respects apparent in the record such as—

(a) That the United States was not an indispensable party respondent.

(b) That these respondents could not withhold payment of the refund of taxes claimed until after it had been finally determined that the petitioner was not indebted for other taxes in excess of the refund claimed.

31 (c) That petitioner did not have a plain and adequate remedy in a suit against the United States.

O. R. McGUIRE,

HARRISON F. McCONNELL,

Attorneys for Respondents.

Copy of assignment of error received this 6th day of January, 1930.

JAMES CRAIG PEACOCK,

Attorney for Appellee.

32

Designation of Record

Filed Jan. 10, 1930

The clerk will please include in the record for the Court of Appeals in the above entitled cause, the following:

1. The petition for mandamus and exhibits.
2. The rule to show cause issued on the petition.
3. The separate answers of the respondents and exhibits.
4. The demurrer to the answers.
5. The memorandum dated December 31, 1929, of the court.
6. The order granting the writ of mandamus.
7. Assignment of errors.
8. This designation.

LEO A. ROVER,

United States Attorney.

33 Supreme Court of the District of Columbia

UNITED STATES OF AMERICA.

District of Columbia, ss:

I, Frank E. Cunningham, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 32, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, a copy of which is made part of this transcript, in cause No. 77256 at law, wherein United States ex relatione Edmund F. Leland is petitioner and J. R. McCarl, Comptroller General of the United States, and Robert H. Lucas, Commissioner of Internal Revenue, are respondents, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 15th day of February, 1930.

[SEAL.]

FRANK E. CUNNINGHAM, *Clerk*.

(Indorsement on cover:) District of Columbia Supreme Court. No. 5152. J. R. McCarl, Comptroller General of the United States, and Robert H. Lucas, Commissioner of Internal Revenue, Appellants, *vs.* United States ex relatione Edmund F. Leland. Court of Appeals, District of Columbia. Filed Feb. 20, 1930. Henry W. Hodges, clerk.

APR 4 - 1930

No. 5152

Henry M. Hodges
CLERK.

**In the Court of Appeals, District of
Columbia**

J. R. McCARL, COMPTROLLER GENERAL OF THE
UNITED STATES, AND ROBERT H. LUCAS, COM-
MISSIONER OF INTERNAL REVENUE, APPELLANTS

v.

UNITED STATES EX RELATIONE EDMUND F. LELAND

APPEAL FROM THE SUPREME COURT OF THE DISTRICT
OF COLUMBIA

BRIEF FOR APPELLANTS

LEO A. ROVER,

United States Attorney,

O. B. McGUIRE,

HARRISON F. McCONNELL,

Attorneys for Respondent.

R. L. GOLZE,

General Counsel, General Accounting Office,

C. M. CHAREST,

General Counsel, Bureau of Internal Revenue,

Of Counsel.

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In the Court of Appeals, District of Columbia

No. 5152

J. R. McCARL, COMPTROLLER GENERAL OF THE
United States, and Robert H. Lucas, Commissioner
of Internal Revenue, appellants

v.

UNITED STATES EX RELATIONE EDMUND F. LELAND

BRIEF FOR APPELLANTS

STATEMENT OF THE CASE

The appellant, Commissioner of Internal Revenue, approved and forwarded September 4, 1929 (R. 12), to the appellant, Comptroller General of the United States, a schedule for \$30,828.43 as refund to the appellee of taxes erroneously collected for the tax year 1919, with \$16,491.95 interest thereon (R. 3). This schedule, or voucher, was accompanied by letter dated September 4, 1929, from the Commissioner to the Comptroller General, notifying him that the appellee was indebted to the United States in the sum of \$60,190.16 as unpaid taxes for the tax year 1918. (R. 12.) Some three years prior thereto, and by letter dated March 30, 1926 (R. 5), the Commis-

sioner had notified the appellee, in pertinent part as follows:

The determination of your income tax liability for the years 1918 and 1919, as set forth in office letter dated January 15, 1924, disclosing an aggregate deficiency in tax amounting to \$134,970.28, has been changed as the result of your protest and the protest on the partnership of Brown and Adams, to disclose a deficiency in tax of \$60,190.16 for 1918 and an overassessment of \$30,828.43 for 1919, as shown in the attached statement.

In accordance with the provisions of section 274 of the revenue act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to contest in whole or in part the correctness of this determination. Any such appeal must be addressed to the United States Board of Tax Appeals, Washington, D. C., and must be mailed in time to reach that board within the 60-day period.

The appellee had contested the deficiency assessment of \$60,190.16 for the tax year 1918 by filing a petition before the Board of Tax Appeals and this petition was pending undecided when this action was instituted October 7, 1929, in the court below. Since said date and by decision dated January 20, 1930, in *Edmund F. Leland v. Commissioner of Internal Revenue*, 18 B. T. A. 859, the Board of Tax Appeals has affirmed the Commissioner of Internal Revenue in the assessment of \$60,190.16. It is understood that appellee Leland has proposed to, or is appealing therefrom to the Circuit Court of Appeals.

When the appellant Comptroller General received the said voucher for \$30,828.43, with interest of \$16,491.95 computed thereon for the tax year 1919, with the formal notification that the taxpayer was indebted to the United States for the tax year 1918 in a much greater sum, he refused to preaudit approve the voucher for refund and to transmit it to the disbursing clerk of the Treasury Department for payment. (R. 3, 9, 10, 13.) Whereupon this action was instituted to compel the Commissioner of Internal Revenue to return the schedule or voucher, after recomputing the interest, to the Comptroller General and to compel the Comptroller General to preaudit approve same for payment.

The appellants filed answers to the petition and rule to show cause. The appellee demurred thereto. (R. 14, 15.) The Court sustained the demurrer and the two officials of the Government electing to stand thereon, the order was issued as prayed. Whereupon this appeal was prosecuted.

I

THE UNITED STATES IS A NECESSARY AND INDISPENSABLE PARTY

The public moneys of the United States are here involved. The appellee is seeking, by mandamus, to require the Comptroller General of the United States to preaudit approve the voucher for refund in the sum of \$30,828.43, with interest of \$16,491.95, when the Commissioner of Internal Revenue had found that the appellee was indebted to the United States in the sum of \$60,190.16 as unpaid taxes and the Board of

Tax Appeals has now affirmed the findings, or deficiency assessment of the Commissioner of Internal Revenue.

We submit that the United States is a necessary and indispensable party in these proceedings. The moneys are those of the United States and it is well settled that suit seeking the control by the Courts of acts of executive and quasi-judicial officers of the United States may not be maintained where the effect of the suits will be to take or control property of the United States without its express consent thereto. *Decatur v. Paulding*, 14 Pet. 518; *United States v. Guthrie*, 17 How. 74; *Minnesota v. Hitchcock*, 185 U. S. 373; *Mississippi v. Durham*, 4 Mackey 235.

The following cases hold the United States an indispensable party when its public property or money is involved in suits against its officers: *Oregon v. Hitchcock*, 202 U. S. 62; *Wells v. Roper*, 246 U. S. 337; *Louisiana v. Garfield*, 211 U. S. 70; *Goldberg v. Daniels*, 231 U. S. 218; *Louisiana v. McAdoo*, 234 U. S. 627; *Maryland Casualty Company v. Collector*, 24 Fed. (2d) 826; *Electric Steel Foundry v. Collector*, 32 Fed. (2d) 892. This is the rule of the State courts. *Sanders v. Saxton*, 75 N. E. 529.

If there ever was a case where the United States was a necessary and indispensable party to a suit against its officers, in an attempt to compel them by mandamus to part with public money, this is such a case and we submit that the United States is an indispensable and necessary party.

II

**THE PETITION AND ORDER GRANTED THEREIN CAN NOT
BE SUSTAINED AS TO THE COMMISSIONER OF INTERNAL
REVENUE**

The Court judicially knows that the appellant Lucas, as Commissioner of Internal Revenue, is a subordinate officer of the Secretary of the Treasury. The appointment of a Commissioner of Internal Revenue is provided for in section 319, Revised Statutes. Section 321, Revised Statutes, provides that:

The Commissioner of Internal Revenue, *under the direction of the Secretary of the Treasury*, shall have general superintendence of the assessment and collection of all duties and taxes * * *. (Italics supplied.)

Section 3220, Revised Statutes, as amended by the act of May 29, 1928, 45 Stat. 996, provides that:

The Commissioner of Internal Revenue, *subject to regulations prescribed by the Secretary of the Treasury*, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected * * *. (Italics supplied.)

That is to say, the Commissioner of Internal Revenue is a subordinate of the Secretary of the Treasury and required to function under the direction of said Secretary. Therefore, in any proceeding by extraordinary judicial process against the Commissioner of Internal Revenue, it is indispensably necessary to join with him as a party respondent or defendant, his superior officer, the Secretary of the Treasury. The petition in this case is fatally defective in this respect,

as is shown by a very recent decision of the Supreme Court of the United States in *Webster v. Fall*, 266 U. S. 506, 511. There the trial court dismissed a bill of complaint brought against two subordinates of the Secretary of the Interior. While the Secretary had been joined as a party respondent, there had been no service on him. The court deemed it unnecessary to hear Government counsel in defense and affirmed the trial court, saying:

There has been no service upon the Secretary and he has not appeared in the suit. The other defendants were served, the case went to trial, and the bill after a hearing was dismissed for want of equity and on the merits. But the suit was one which required the presence of the Secretary, and the bill should have been dismissed for want of a necessary party. *Gnerich v. Rutter*, 265 U. S. 388; *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 34. The statutory direction to cause quarterly payments to be made (subject to §2087) is addressed to the Secretary. The power and responsibility are his. Neither Wright nor Wise has any primary authority in the matter. *They can act only under, and in virtue of, the Secretary's general or special direction.* In the absence of it no payments or disbursements properly can be made. Authority in the Superintendent to supervise such payments is not authority to cause them to be made. The statement of this Court in the *Gnerich* Case (p. 391) is pertinent here: "They act under his direction and perform such acts only as he commits to them by the regulations.

They are responsible to him and must abide by his direction. What they do is as if done by him. He is the public's real representative in the matter, and, if the injunction were granted, his are the hands which would be tied." In the *Smith Case* suit was brought against the Secretary of the Interior and the Commissioner of the General Land Office to enjoin them from exercising further jurisdiction with respect to the disposition of certain public lands; from further trespassing upon complainant's right of quiet possession; and to command the issue of patents to plaintiff. The suit abated as to the Secretary because of his resignation, and it was held that it could not be continued against the Commissioner alone. We quote from the opinion (pp. 34-35): "The purpose of the bill was to control the action of the Secretary of the Interior; the principal relief sought was against him; and the relief asked against the Commissioner of the General Land Office was only incidental, and by way of restraining him from executing the orders of his official head. To maintain such a bill against the subordinate officer alone, without joining his superior, whose acts are alleged to have been unlawful, would be contrary to settled rules of equity pleading." (*Italics supplied.*)

This rule is doubly applicable here. Not only is the Commissioner of Internal Revenue a subordinate of the Secretary of the Treasury and subject, under the statutes, to his direction, but the Commissioner can not pay a dime out of the Treasury of the United States. There is in the Treasury Department, but

not in the Bureau of Internal Revenue thereof, a disbursing clerk of the Treasury. This disbursing clerk is appointed by the Secretary of the Treasury. Section 176, Revised Statutes, as amended by the act of March 3, 1883, 22 Stat. 553. This disbursing clerk can secure no public funds to disburse except upon a warrant signed by the Secretary of the Treasury and countersigned by the Comptroller General of the United States. Section 11 of the act of July 31, 1894, 28 Stat. 209, as amended by the Budget and Accounting Act of June 10, 1921, 42 Stat. 23, 27. There is no statute applicable in these mandamus proceedings which would change this rule such as is applicable in proceedings under the Revenue Act of 1926, 44 Stat. 55, 57, in proceedings before the Board of Tax Appeals when the Commissioner may be made the sole defendant, or respondent.

We think, therefore, that under controlling authority, neither the petition for writ of mandamus nor the order granting same against the Commissioner of Internal Revenue can be sustained because, as to him, the Secretary of the Treasury, his superior officer, is a necessary and indispensable respondent.

III

A TAXPAYER IS NOT ENTITLED TO MANDAMUS TO COMPEL PAYMENT OF A TAX FOR ONE TAX YEAR WHEN THERE IS AN UNPAID PROPOSED DEFICIENCY ASSESSMENT OF TAXES AGAINST SUCH TAXPAYER IN EXCESS OF THE REFUND

On the merits, this case resolves itself into one, principally for interest. The overpayment of taxes for 1919 amounts to \$30,828.43 (exclusive of interest) and the deficiency then pending before the Board of

Tax Appeals for 1918 and which was affirmed in opinion of January 20, 1930, of the Board amounts to \$60,190.16. If the refund is paid at this time, as sought by the appellee, interest must be paid on the item of \$30,828.43 under section 614 of the Revenue Act of 1928 from the date of overpayment to a date not more than thirty days prior to the date of the refund.

If the \$60,190.16 deficiency is due the Government, it was due March 16, 1919, that being the date fixed by law when the tax became due and payable, and in the instant case if the \$60,190.16 deficiency as determined by the Commissioner and the Board of Tax Appeals, is finally sustained in event it is taken to the Court of Appeals, the Government can collect interest on that deficiency only from February 26, 1926, that being the date fixed by section 283 (d) of the Revenue Act of 1926. The law requires the Government to pay interest on overpayments at six per centum per annum from the date of the overpayment to approximately the date of the refund. In other words, if payment of the refund is found by this Court to be due at this time, the petitioner will receive interest on the overpayment for 1919 for the full period from the date of overpayment to approximately the date of the refund check and if the deficiency is finally sustained, the Government, under existing law, can collect interest only from February 26, 1926, thereby leaving the noninterest bearing period from March 15, 1919 (the due date fixed by law), to February 26, 1926, on the deficiency or, in other words,

the Government is paying interest on the overpayment for a period of six years, while the taxpayer is not required to pay interest for that period of time on his deficiency.

Viewed from another angle, if the refund is paid now the Government will be required to pay interest on \$30,828.43 over a period of years during which the taxpayer upon the record was *prima facie* indebted to it in the sum of \$60,190.16. The taxpayer will have had the use of the Government's money, with the result that the Government will be compelled to pay interest for a considerable period on its own money. There is in point the case of the *Union Pacific Railway Company v. Bowers*, 24 Fed. (2d) 788, where the Circuit Court of Appeals for the Second Circuit had under consideration the question of interest on overpayment. The Court said:

Nor is an interpretation of the section reasonable which would compel a taxpayer, the incorrectness of whose return is first disclosed to him before Government inspection, to pay his deficiency at the eleventh hour and thus deprive the Government of interest by coming out ahead in a race with the Commissioner. There would be a great temptation to hold back in all doubtful cases and make voluntary payments at the last minute in order to avoid paying interest.

There is also for consideration here the recent decision of February 10, 1930, of the Court of Claims in *Riverside and Dan River Cotton Mills, Inc., v. United States* H-2, where the Court said:

The revenue act of 1921, section 250 (b), was the first statute to require the payment by taxpayer of interest upon a deficiency assessment other than the usual interest required to be paid because of the filing of a claim for abatement or credit, for failure to pay after notice and demand, and for negligence. Such act provided for the payment of interest at the rate of $\frac{1}{2}$ of 1 per centum per month on a deficiency from the time the tax was due, or, if paid in installments from the time the installments were due to the date paid. Section 1324 (a) of the revenue act of 1921 provided for the payment of interest upon a refund or credit at the rate of $\frac{1}{2}$ of 1 per centum per month. The revenue act of 1924, section 1019, provided for the payment of interest on all refunds and credits from the date the tax was paid to the date of the allowance of the refund, or, in the case of a credit, to the due date of the amount against which the credit was taken, and provided that if the amount against which the credit was taken was an additional assessment, then to the date of the assessment of that amount. In section 1116 of the revenue act of 1926 it was provided that if the amount against which the credit was taken was an "additional assessment made under the revenue act of 1921, the revenue act of 1924, or of this act," then to the date of the assessment of that amount. By this change it seems manifest that it was intended to provide for the payment of interest upon the amount of a credit if taken against an additional assessment of a tax for the year

1921, or subsequent years, to the date of assessment of such additional tax, but if the additional assessment was of a tax for a year prior to 1921 interest would be paid only from the date of the overpayment to the date on which the taxpayer should have paid the tax against which credit is applied. In other words, it was not the purpose of Congress to require the payment of interest on an overpayment during the time when the taxpayer was indebted to the Government in an equal amount upon which he was paying no interest.

It was argued in the court below and doubtless will be again argued here, that notwithstanding the unfairness of the contention made by the appellee in event it should be sustained by the court, there is no escape therefrom. It is said that under section 284 (a) of the Revenue Act of 1926, 44 Stat. 66, and section 3220, Revised Statutes, as amended by section 3 of the act of May 29, 1928, 45 Stat. 996 (quoted in paragraph 5 and 6 of the petition, R. 2), it is the mandatory duty of respondent, Commissioner of Internal Revenue, to refund any overpayment of taxes after he has determined that such an overpayment has been made. However, this rule is subject to exceptions, as this court recognized and enforced quite recently in *United States ex rel. Endicott v. Mellon et al.*, No. 501. We think such an exception exists here. Section 284 of the Revenue Act of 1926, 44 Stat. 66, provided that:

Where there has been an overpayment of any income, war-profits, or excess-profits tax

imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act, as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(d) If the Commissioner has mailed to the taxpayer a notice of deficiency under subdivision (a) of section 274 and if the taxpayer after the enactment of this Act files a petition with the Board of Tax Appeals within the time prescribed in such subdivision, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except * * *.

The refund in this case could not be credited to the proposed deficiency assessment while the case was pending before the Board of Tax Appeals nor, indeed, until the decision of the Board has become final.

However, this restriction did not prevent the appellants from refusing to make any refund whatever until such decision had become final, thereby preventing gross discrimination between taxpayers who had their refunds credited against outstanding assessments and those taxpayers who, under the decision of the court below, receive refunds of taxes erroneously collected and are permitted to pay their deficiency assessments.

There is not a word in the statutes relating to the Commissioner of Internal Revenue, the Board of Tax Appeals, or the Comptroller General, which makes it the duty of these officials, to refund taxes to a taxpayer for one tax year while an unpaid deficiency assessment against this taxpayer is outstanding for some other tax year. It seems to have been the assumption of the statute that only where there is a net balance of taxes due a taxpayer shall refund be made.

The case is of great importance to the United States. The Commissioner of Internal Revenue reported to the office of the Comptroller General under date of October 26, 1929, that—

During the fiscal year ended June 30, 1928, overpayments of income and profit taxes to the extent of \$55,950,574.88 were credited to other such taxes due from the taxpayers for other years. The interest allowed on such credits amounted to approximately six million dollars; whereas, if these overpayments had been refunded instead of credited, the interest paid by the Government would have amounted to approximately \$14,500,000, an additional cost of approximately \$8,500,000 to the Government.

To protect the right of set-off to the United States, it has been the practice of the Department for the past several years to withhold the payment of refunds pending the determination of the appeal by the Board of Tax Appeals relative to a deficiency and to pay only those portions of refunds in excess of the amount of the deficiency involved in the appeal.

Of course, as counsel for the appellants, it is recognized that should the law make it the mandatory duty of the appellants to refund any overpayment of taxes, the court could properly direct by mandamus that it be done. We think, however, that under the principles of statutory construction summarized in sections 287 and 288, Sutherland on Statutory Construction, 1891 Edition, pp. 371, 372, and of the obvious injustice to the Government, as well as discrimination between taxpayers, there is no such mandatory duty in this case and that the court below was in error in directing issuance of the writ as prayed.

IV

**THE APPELLANT, COMPTROLLER GENERAL, WAS UNDER
LEGAL DUTY TO REFUSE TO APPROVE THE VOUCHER
OR SCHEDULE FOR REFUND OF TAXES**

As hereinbefore stated, when the proposed refund of \$30,828.43, with interest, was transmitted to the appellant, Comptroller General for preaudit approval, he was officially notified that there had been proposed an additional assessment of taxes in the sum of \$60,190.16 for the preceding tax year, which had

not been paid. This deficiency proposed by the Commissioner of Internal Revenue has been subsequently approved by the Board of Tax Appeals. At least the taxpayer is *prima facie* indebted to the United States for taxes in excess of the amount of the refund due. Under such circumstances, there is for application the act of March 3, 1875, 18 Stat. 481, which provided:

That when any final judgment recovered against the United States or other claim duly allowed by legal authority, shall be presented to the Secretary of the Treasury for payment, and the plaintiff or claimant therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Secretary to withhold payment of an amount of such judgment or claim equal to the debt thus due to the United States; and if such plaintiff or claimant assents to such set-off, and discharges his judgment or an amount thereof equal to said debt or claim, the Secretary shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff, or claimant, denies his indebtedness to the United States, or refuses to consent to the set-off, then the Secretary shall withhold payment of such further amount of such judgment, or claim, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Secretary to cause legal proceedings to be immediately commenced to enforce the same,

and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Secretary with six per cent interest thereon for the time it has been withheld from the plaintiff.

Formerly this statute was administered by the Secretary of the Treasury, but the Budget and Accounting Act of June 10, 1921, 42 Stat. 23, 27, transferred his duties thereunder to the Comptroller General of the United States. See *United States v. LaGrange Grocery Company*, 31 Fed. (2nd) 297.

The Comptroller General did not direct the institution of suit against the appellee to recover taxes of \$60,190.16 as directed in the 1875 statute. He did not do this for the reason that under the statutes creating the Board of Tax Appeals and the procedure established thereunder, the deficiency assessment had been proposed against the appellee and the appellee had instituted proceedings before the Board of Tax Appeals in an attempt to overturn the deficiency assessment. This proceeding was equivalent to suit to determine the deficiency assessment in taxes and the proceedings having been instituted, neither the taxpayer nor the United States could resort to some other tribunal or procedure for the determination of the deficiency assessment in taxes when the refund was withheld under the 1875 statute.

CONCLUSION

Upon the whole case we respectfully submit that the order of the court below in directing the issuance of the writ of mandamus against these appellants was in error and should be reversed.

Respectfully,

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APR 26 1930

Harry M. Hodges

IN THE

CLERK.

Court of Appeals, District of Columbia

No. 5152.

J. R. McCARL, COMPTROLLER GENERAL OF THE UNITED
STATES, AND ROBERT H. LUCAS, COMMISSIONER OF
INTERNAL REVENUE,

Appellants,

v.

UNITED STATES EX RELATIONE EDMUND F. LELAND,

Appellee.

BRIEF FOR APPELLEE.

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v.

UNITED STATES EX RELATIONE EDMUND F. LELAND,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The statement at pages 1-3 of appellant's brief while substantially correct is slightly inaccurate and inadequate in certain particulars, which will be noted in order to avoid possible misunderstanding.

The Commissioner's letter of September 4, 1929, to the Comptroller did not advise that appellee "was indebted" to the United States as is several times stated

on pages 1 and 3. It advised merely the amount of "proposed deficiency taxes against the taxpayers for the year 1918 which have become the subject of petitions to the United States Board of Tax Appeals." (R. 12.)

Neither did his letter of March 30, 1926, to the appellee advise that the 60 day right of appeal from the determination of a deficiency for 1918 also applied to the "determination" of the overassessment for 1919 as would seem to be indicated by the incomplete quotation therefrom on page 2. On the contrary a further paragraph of the letter (R. 8) stated expressly, and in accordance with the statute as to the finality of the Commissioner's determination of overassessments, that the appeal referred to applied only to the determination for 1918.

The opinion of the Board was promulgated January 20, 1930, and is reported at 18 B. T. A. 859, and incidentally is not entirely unfavorable as it permits a small reduction in the proposed determination. There is also reported at page 871 the dissenting opinion of three members. As shown, however, at page 870 no final judgment was entered. In fact judgment has not yet been entered and may not be for some time to come, and meanwhile no appeal can be taken to the Circuit Court of Appeals until the Board enters its final judgment.

The appellant's statement does not quote any of the provisions of the schedule which the Commissioner sent to the Comptroller General and which is printed at length at R. 2-3. In order to properly present the issue, however, a statement of the case should show that that schedule included the final authorization over the Commissioner's signature as follows:

“The Disbursing Clerk, Treasury Department, is authorized to pay the amounts specified in column 9 or 10, or both.”

and that \$47,320.38 (the sum of the \$30,828.43 refund and \$16,491.95 interest thereon) was entered in column 9 or 10 as the “Amount to be paid” to the present appellee.

STATEMENT OF APPELLEE’S POSITION.

The position of the appellee is that under the controlling statutes it is the duty of the respondent Commissioner to make the refund here in question and that he was the final judge in the administrative branch of the Government to decide that an overassessment had been made and that a refund should be granted; that after such determination has been made as here the further duties of both respondents in the premises are ministerial in their nature and enforceable by mandamus; and that it is also expressly required by statute that an amount so determined as refundable “shall be refunded immediately to the taxpayer.”

Our position—as well as the correct law of the case—is well stated in the short and concise memorandum opinion of Mr. Justice Bailey in the court below (R. 16):

“Where the language of a statute is unambiguous, its natural and plain meaning must be followed, even though it produce a result contrary to some extent to the interests of the United States and favorable to a taxpayer. Under the statute applicable to this case the duties of the respondents are ministerial in their nature and the petitioner is entitled to have them performed. The demurrers to the answer of the respondents will be sustained.”

ARGUMENT.

I. The respondent Commissioner has determined an overassessment and overpayment of \$30,828.43 for 1919, and has authorized its refund.

In a final audit letter of March 30, 1926, the Commissioner of Internal Revenue determined an overassessment of the appellee taxpayer's income tax for 1919 in the amount of \$30,828.43 (R. 2). Thereafter on September 4, 1929, the Commissioner certified to the respondent Comptroller General a schedule showing that the full amount of the said \$30,828.43 was a refundable overpayment (R. 3). On the same schedule was also the express authorization to the Disbursing Clerk, Treasury Department, to pay the refund with interest (R. 3).

II. This authorization by the Commissioner was conclusive, and he was the final judge in the administrative branch of the Government to decide that the refund should be granted.

The Commissioner was expressly authorized to make this refund. Sec. 3220 of the Revised Statutes, as amended by Sec. 3 of the Act of May 29, 1928 (45 Stat. 996), provides:

“REFUNDMENTS; TAXES AND PENALTIES.—The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; * * *

Congress has also expressly provided that such action by the Commissioner is not subject to review by the respondent Comptroller General. Sec. 1107 of the Revenue Act of 1926 (44 Stat. 113) provides:

“SEC. 1107. In the absence of fraud or mistake in mathematical calculation, the findings of facts in and the decision of the Commissioner upon (or in case the Secretary is authorized to approve the same, then after such approval) the merits of any claim presented under or authorized by the internal revenue laws shall not, except as provided in Title IX of the Revenue Act of 1924, as amended, be subject to review by any other administrative or accounting officer, employee, or agent of the United States.”

The exception in Title IX of the Revenue Act of 1924 relates only to the right of appeal to the Board of Tax Appeals from a determination of a deficiency such as that for 1918. It is apparent therefore that in the matter of refunds the respondent Comptroller General has no authority whatever to hold the matter up on such grounds as he has assumed to act upon in the present case.

In *Girard Trust Co. v. United States*, 270 U. S. 163, the Supreme Court held specifically that the Commissioner of Internal Revenue is the final judge in the administrative department of the Government to decide that an overassessment has been made and that a refund should be granted. That case related to the interest on a refund under the corresponding provisions of the Revenue Act of 1921, and the Court held at page 169:

“Allowance in its ordinary sense does not mean payment, and in the practical administration of

the Treasury Department the two things are quite different. The one is *a decision by the competent authority that the payment should be made*. The other is the actual payment.

The Commissioner of Internal Revenue is the final judge in the administrative branch of the government to decide that an overassessment has been made and that a refund or credit should be granted, and when he has made that decision finally, he has allowed the claim for the refund or credit of the taxes paid within the meaning of the section." (Italics supplied.)

In *McCarl v. United States ex rel. Societa*, 58 App. D. C. 319, this Court, approaching from the opposite angle an almost identically similar question, held that the present respondent Comptroller General was not authorized to review a finding by the Secretary of Labor directing the refund of an immigration fine. That case and the present are closely alike in every respect, except that if anything the present is a stronger case against the Comptroller General in that the statutory authority of the Commissioner of Internal Revenue is even more specific than that of the Secretary of Labor. There was no positive statutory authority to the Secretary to make such refunds but merely the words "all to be expended under the direction of the Secretary of Labor" appended to two appropriation items for the refund of taxes and fines. This Court held at page 321:

"In the present instance the Comptroller General was not charged with duties requiring the exercise of judgment or discretion, but was called upon to perform a purely ministerial function. The proceeding related solely to the disposition of certain funds which Congress had appropriated

for the refunding of immigration fines, which were to be refunded upon presentation of evidence showing conclusively that collection thereof was made through error of government officers. The funds thus appropriated were to be expended under the direction of the Secretary of Labor, consequently the finding of that officer that the fines in question were collected through error of government officers was conclusive, and the Comptroller General was not authorized to review it. The certification of the voucher by him would be a ministerial act only."

It is obvious that if under such circumstances the finding of the Secretary of Labor was conclusive and the Comptroller General was not authorized to review it, the same is even more true in the present case.

III. The statute is express and unambiguous in its requirement that this overpayment shall be refunded immediately to the appellee taxpayer.

Sec. 284 (a) of the Revenue Act of 1926 (44 Stat. 66) is as follows:

"Sec. 284(a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited

against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer."

The exception in subdivision (d) relates only to cases where there has been previously a determination of a deficiency for the same year and has no bearing in the present case. Sec. 614(a) of the Revenue Act of 1928 (45 Stat. 876) further provides for interest at the rate of 6 per cent upon such refunds to a date not less than thirty days prior to the date of the refund check.

The record in the present case shows clearly that, in accordance with the provisions of Sec. 284(a), the Commissioner certified the initial overassessment of \$30,828.43 to the Collector to determine to what extent it represented an overpayment, and to what extent there were any taxes then due from the taxpayer against which such overpayment should be credited; that the Collector in due course certified back that the entire amount was an overpayment and that, there being no other taxes then due, it was refundable in full; and that the Commissioner then sent the schedule forward on its journey to the Disbursing Clerk and with the proper authorization to that officer (R. 2-3). Under the express and unambiguous terms of the statute it must therefore "be refunded immediately to the taxpayer."

There has not been and of course could not be any question as to the propriety and correctness of the action of the Collector and the Commissioner in certifying that there were no other taxes then due. It was admitted in the statement (R. 8) in the Commissioner's final audit letter that payment of the defi-

ciency should not be made until a bill is received from the Collector, and of course a bill cannot be received until after the decision of the Board becomes final and an assessment has been made. It is again so admitted by both respondents at the bottom of page 13 of their brief. It is expressly so prescribed by other sections of the same Revenue Act of 1926 which provide that no assessment shall be made until at least six months after the entering of its judgment by the Board; that, if the decision is against the taxpayer and he thereupon gives bond, then it cannot be made until after final review of the decision by this Court, a Circuit Court of Appeals, or the Supreme Court; and that an injunction may issue to restrain any attempt to assess prior to such final decision by the Board or the courts. Revenue Act of 1926, Secs. 274(a), 283(a), 1001, and 1005 (44 Stat. 55, 63, 109, 110). It would likewise, even in the absence of such statutory provisions, be so established by the authorities, under which it is well settled that "due" as thus used means already, actually, absolutely, and immediately payable. *Prentiss v. Kingsley*, 10 Pa. 120, 123; *Bank v. Wise*, 3 Watts (Pa.) 394, 403; *Allen v. Patterson*, 7 N. Y. 476, 479; *Cutter v. Perkins*, 47 Me. 557, 566; *Cross v. McMaken*, 17 Mich. 511, 515; *Bowers v. Hechtman*, 45 Minn. 238; *Gies v. Bechtner*, 12 Minn. 279, 284; Sol. of Int. Rev. Op. 147, C. B. I-2, p. 215; G. C. M. 2455, C. B. VI-2, p. 107.

IV. The remaining duties of both appellants are ministerial and enforceable by mandamus.

That in the case of both the present appellants the further duties sought to be compelled in the present proceeding are ministerial and enforceable by manda-

mus is conclusively established by two controlling decisions of this Court. The one, *Blair v. United States, ex rel. Union Pacific Ry. Co.*, 55 App. D. C. 359, so holds as to the duties of the Commissioner under the corresponding and substantially identical Sec. 252 of the Revenue Act of 1921 (42 Stat. 227). The other, *McCarl v. United States, ex rel Societa*, 58 App. D. C. 319, already referred to in this brief, so holds with respect to the Comptroller General's duties where a refund has been authorized by another officer whose findings in the matter are conclusive.

It will be recalled that Sec. 284(a) upon which the present proceeding is predicated provides that such overpayment shall be credited against any tax or installment thereof then due from the taxpayer, and any balance thereof shall be refunded immediately to the taxpayer. This identical provision was first enacted as Sec. 252 of the Revenue Act of 1918 (40 Stat. 1085) and has been repeated in each successive revenue act. In the Revenue Act of 1921 it appears as Sec. 252 (42 Stat. 268), and in the *Union Pacific* case this Court held that the Commissioner's duties thereunder were ministerial and enforceable by mandamus. The only difference between that case and the present is that there it was sought to have the overpayment credited. The distinction, however, is not material because the important point is that after the overpayment has been determined the question as to whether it shall be credited or refunded is a mere incidental matter of clerical routine. The important thing is that once the overpayment has been determined the Commissioner's further duty under one and the same clause of the statute is to adjust and dispose of it by credit or refund as the case may be,

and the *Union Pacific* case is direct authority to that effect. In that case, as in the present case, the Supreme Court of the District of Columbia had granted a mandamus compelling the Commissioner to make the proper credit, and in affirming that action this Court said at page 361:

“The duty imposed upon the respondent, according to the conceded facts in the case, was mandatory, not discretionary; the language of the statute is ‘the amount of the excess shall be credited;’ the courts therefore have jurisdiction to determine the correct construction of the statute and to compel the respondent to proceed accordingly. *Lane v. Hoglund*, 244 U. S. 174, 37 S. Ct. 558, 61 L. Ed. 1066; *Work v. McAlester-Edwards Co.*, 262 U. S. 200, 43 S. Ct. 580, 67 L. Ed. 949. See, also, *Interstate Commerce Commission v. Humboldt S. S. Co.*, 224 U. S. 474, 32 S. Ct. 556, 56 L. Ed. 849; *Louisville Cement Co. v. Interstate Commerce Commission*, 246 U. S. 638, 38 S. Ct. 408, 62 L. Ed. 914.

Nor has the relator any other remedy than mandamus by which to enforce its plain legal rights under the statute. The fact that it might at the same time have other rights with other remedies arising out of the same transaction, does not negative this statement.”

In the same way in the *Societa* case, the facts and question in which have already been stated at page 6 of this brief, this Court in affirming the judgment of mandamus entered by the Supreme Court of the District of Columbia said at page 321:

“In our opinion the lower court’s judgment was not erroneous. It is true that mandamus will not lie to review or control the acts of executive

officers of the government in respect of matters as to which they are vested with discretion, nor can such officers be compelled to act or render a decision in any particular way so as to make the writ serve the function of an appeal or a writ of error. On the other hand, the writ may issue to compel such officers to perform purely ministerial duties when imposed upon them by law. *Kendall v. United States, ex rel. Stokes*, 12 Pet. 524, 9 L. Ed. 1181. In such case the writ will issue, even though the refusal of the officer to perform the act is based on an erroneous construction by him of the statute. *Roberts, Treas., v. United States ex rel. Valentine*, 176 U. S. 221, 20 S. Ct. 376, 44 L. Ed. 443; *McAlester-Edwards Coal Co. v. Fall*, 51 App. D. C. 171, 277 F. 573, affirmed *Work v. U. S. ex rel. McAlester-Edwards Co.*, 262 U. S. 200, 43 S. Ct. 580, 67 L. Ed. 949."

That decision is directly in point in the present case. In both cases the Comptroller General has refused "to preaudit approve" and transmit to the proper disbursing officer vouchers authorizing refunds which have been signed and forwarded in due course by the officer of the Government whose finding in the matter is conclusive.

It is submitted therefore that there is no longer any question or room for argument as to the nature of the duties sought to be performed in the present case or as to the correctness of the judgment of mandamus entered by the court below.

V. Each of the four points constituting appellants' brief is unsound and erroneous.

It will be noted that appellants' brief is technically objectionable in that it contains no specification of

“such of the errors as shall be relied upon” as required by paragraph 3(a) of Rule VIII. Their second point to the effect that the Secretary of the Treasury was a necessary party respondent should also be disregarded under paragraph 5 of Rule VIII for the further reason that no such error was assigned. Each one of their four points is, however, unsound and erroneous, as we now show, and we ask therefore that the judgment below be affirmed on the merits.

(a) *The United States is not a necessary or indispensable party.*

It is settled law that in proper cases mandamus will issue to require payments by an officer of the United States out of the public moneys of the United States. *Roberts v. United States ex rel. Valentine*, 176 U. S. 221, affirming 13 App. D. C. 38; *Smith v. Jackson*, 246 U. S. 389. In the *Roberts* case it was held that mandamus should issue to direct payment by the proper administrative officer of interest as provided by an act of Congress. The Supreme Court considered at length the objections to mandamus as a proper remedy, and concluded at page 231—

“In this case we think the proper construction of the statute was clear, and the duty of the Treasurer *to pay the money to the relator* was ministerial in its nature, and should have been performed by him upon demand.”

That decision is controlling here, where as shown in Point III of this brief the statute is express and unambiguous in its requirement that this overpayment shall be refunded immediately to the taxpayer.

This Court is familiar with this principle and in

addition to the *Roberts* case has frequently given effect to it in other mandamus cases *for the payment of money*, including two decided as recently as March 3, 1930—

Cortelyou v. Thorpe, 32 App. D. C. 20;
Blair v. Birkenstock, 55 App. D. C. 276;
Work v. Gouin, 57 App. D. C. 170;
McCarl v. Societa, 58 App. D. C. 319;
Hines v. Cavanaugh, 59 App. D. C. —, 58 W. L. R. 230;
Hines v. Easton, 59 App. D. C. —, 58 W. L. R. 232;
Cf. Halstead v. McCarl, 58 W. L. R. 150 (S. C. of D. C.).

In the *Thorpe* case the contention “that the court was without jurisdiction to entertain this suit because * * * the object of the suit is to require the payment out of the Treasury of the United States of a sum of money” was at the very outset of its opinion dismissed by this Court with the statement at page 28 that if there had been

“full compliance on the part of petitioner with the provisions of the act, the respondent is deprived of any discretion in the matter, and nothing remains to be done but the purely ministerial act of payment.”

That mandamus may issue in a case such as the present is, as just shown, so well established that it seems inexcusable for appellants to burden their brief with the long line of irrelevant citations on page 4 and to give the impression conveyed by the paragraph at the bottom of that page. Most of the cases cited are not even mandamus cases. One was a bill against a collector to cancel an income tax waiver;

another a bill by a surety to secure exoneration; three were bills in equity relating to the title to school lands and swamp lands; etc. The *Durham* case was a *nisi prius* decision in 1885 by a single judge at chambers long since overruled by the authorities just cited. The other mandamus cases were all expressly decided on other grounds. *Decatur v. Paulding*, 14 Pet. 497, related to an act involving exercise of judgment on the part of the Secretary of the Navy; *United States v. Guthrie*, 17 How. 284, related to a disputed and controverted claim against the United States; and *Goldberg v. Daniels*, 231 U. S. 218, related to a matter within the discretion of the Secretary of the Navy. This last case involved an abortive sale of an old cruiser and the court also added that the suit must fail because the United States was its owner but could not be made a party. Appellants have entirely failed to appreciate the distinction suggested in *Smith v. Jackson*, 241 Fed. 747 (affirmed in 246 U. S. 388), and *Cramp v. International Company*, 246 U. S. 28, that an action to compel an officer of the United States to perform his plain ministerial duties under the laws of the United States is not essentially an action against the United States and does not interfere with the property of the United States.

(b) *The petition and order granted can be sustained against the Commissioner of Internal Revenue.*

Here again in their second point the appellants go far afield to rely upon a case in another department of the Government which is not at all in point while they shut their eyes and entirely overlook decisions of this Court in tax cases which are directly in point. We refer to and rely upon such cases as *Blair v. Bir-*

kenstock, 55 App. D. C. 276, and *Blair v. Union Pacific Ry. Co.*, 55 App. D. C. 359. In neither of these cases was the Secretary of the Treasury joined as a party, and in both of them the granting of mandamus against the Commissioner of Internal Revenue was affirmed by this Court under substantially similar provisions of the internal revenue statutes.

They cite Sec. 3220 of the Revised Statutes which provides that the Commissioner, subject to regulations prescribed by the Secretary of the Treasury, is authorized to refund and pay back all taxes erroneously collected and overlook the fact that under the established Treasury Department procedure, as approved by the Comptroller General himself on September 21, 1926, (R. 3) it is the Commissioner alone who signs the authorization to the Disbursing Clerk to make the payment, and that this entire procedure is in accordance with the most recent "regulations prescribed by the Secretary of the Treasury" (T. D. 3260 approved December 8, 1921, by A. W. Mellon, Secretary of the Treasury). That Treasury Decision specifically provides that the Commissioner shall cause the necessary allowance documents to be prepared and that upon their approval the Commissioner will forward the schedules with the allowance documents to the Disbursing Clerk of the Treasury Department.

While it may be true that the Commissioner is a subordinate of the Secretary of the Treasury, yet it is the Commissioner and not the Secretary who is alone authorized by law to refund and pay back taxes illegally collected. Sec. 3220 specifically so provides, and the only limitation on the Commissioner's authority is that he shall act subject to regulations prescribed by the Secretary of the Treasury. Appellants cite

no regulations which in any way hinder the action sought to be enforced in this procedure, and on the contrary as we have just shown the regulations expressly provide that the Commissioner and not the Secretary shall forward the schedules or allowance papers to the Disbursing Clerk.

The case of *Webster v. Fall*, 266 U. S. 506, upon which appellants expressly bottom their second point related to an entirely different situation. There it was the Secretary of the Interior who was expressly required by the act to make the payment and obviously such payment could not be enforced in a case against his subordinates in which the Secretary had not even been served. It is equally obvious that that case is neither "controlling authority" nor any other kind of authority here where it is the Commissioner and not the Secretary who is by the express terms of the statute authorized to make the refund.

A further and complete answer to this point is that the present proceeding is to enforce the performance only of the particular duties which are imposed upon the Commissioner by the statutes and regulations. The Secretary has not declined to perform any duty in the premises, and could very properly object if he had been joined.

(c) A taxpayer is entitled to mandamus to compel payment of a refund for one tax year even though there is an unpaid proposed deficiency of taxes against such taxpayer for another year in excess of the refund.

This point goes squarely to the substance and merits of the case. At the very outset the appellants' erroneous use of the term "assessment" in the fourteenth line on page 14 of their brief should be noted.

There has been no assessment of the proposed deficiency for 1918 and it will be a long time, if ever, before there can be any such assessment. The final judgment of the Board of Tax Appeals has not yet been entered, and as shown in Point III of this brief neither assessment nor collection can be made until at least six months after the Board enters its judgment (which it has not yet done) nor until after final decision by the courts if a bond and petition for review are filed.

A careful reading shows that the appellants' entire third point on pages 8-15 of their brief is little more than an argument as to why the statute *should have provided* that a refund should not be required in such a case as the present. This argument might properly be addressed to Congress but it has no place in a brief in this court. Even here they overlook the well known fact that the whole purpose of Congress in establishing the Board of Tax Appeals in 1924 was to entitle the taxpayer "to an appeal and to a determination of his liability for the tax prior to its payment" (H. R. Report on Revenue Act of 1924, 68th Congress, First Session). If Government officials could indefinitely withhold overpayments which Congress had expressly enacted "shall be refunded immediately to the taxpayer" this purpose would be just as effectually defeated as if those officials went out and required actual payment of the proposed deficiency in tax.

The reference on page 12 of appellants' brief to the recent decision of this Court in the *Endicott* case, 58 W. L. R. 232, is totally unjustified and misleading. That case is no more in point than have been the other cases cited by appellants. In fact it is just the opposite of the present case. There *the Commissioner*

had denied the refund and determined that it was not allowable, and naturally mandamus would not issue. Indeed on the contrary the case fully supports our position in the present case as this Court reiterated at page 233 that "it is the Commissioner who determines whether an overpayment has been made, and it is for him therefore to determine whether an alleged claim of refund complies with the statutory requirements."

The gist of the present case is perhaps all unconsciously admitted at the bottom of page 13 and the top of page 14 of appellants' brief where they concede that—

"The refund in this case could not be credited to the proposed deficiency assessment while the case was pending before the Board of Tax Appeals nor, indeed, until the decision of the Board has become final."

and then continue with the bald assertion that—

"However, this restriction did not prevent the appellants from refusing to make any refund whatever until such decision had become final, thereby preventing gross discrimination between taxpayers who had their refunds credited against outstanding assessments and those taxpayers who, under the decision of the court below, receive refunds of taxes erroneously collected and are permitted to pay their deficiency assessments."

The answer is of course simple. "This restriction" does not have anything to do with the present 1919 case. Its only effect is that because of it the proposed deficiency for 1918 admittedly cannot be assessed and is not yet due. In accordance with the orderly pro-

cedure of the Bureau of Internal Revenue it had been correctly determined on voucher IT—35254 that there were no other taxes against which the \$30,828.43 could be credited and that that entire amount with interest thereon was refundable (R. 2-3). The appellants utterly ignore the forceful word “immediately” in Sec. 284(a). There is not a word in their brief explaining why, under the law *as it is* (and not as they think it should be), this amount shall not be immediately refunded to the taxpayer as expressly required by Sec. 284(a).

(d) *The appellant Comptroller General was not under legal duty to refuse to approve the voucher or schedule for refund taxes.*

In the final point of appellants’ brief it is suggested that the appellant Comptroller General was under a legal duty to refuse to approve this refund. The suggestion is based on the Act of March 3, 1875 (18 Stat. 481), which provided in the most general terms for an offsetting against an allowed claim in any case where the claimant therein is otherwise indebted to the United States.

It will be noted, however, that this suggestion is neither vigorously urged nor much discussed—for which there is very good reason as we shall see.

The Act of 1875 is most general in its terms and application to all kinds of judgments and claims. Sec. 284(a) of the Act of 1926 (which is a reenactment without substantial change of a provision originally enacted as Sec. 252 of the Revenue Act of 1918, (40 Stat. 1085) is on the other hand and in two different respects a very specific provision applying only to a single special class of claims.

Sec. 284(a) does not even apply to all claims arising out of overpayment of internal revenue taxes, but only to overpayments of taxes on incomes or excess profits—which are only two out of the many objects on which internal revenue taxes are levied. Furthermore it expressly provides for the offsetting against such overpayments of a specific and limited class of claims by the Government—*i. e.*, income or profits taxes then due from the taxpayer. *Inclusio unius est exclusio alterius*. When a statute provides for a thing to be done in a particular mode, it includes the negative of any other mode. *Botany Worsted Mills v. United States*, 278 U. S. 285.

In a word Sec. 284(a) is—as compared with the wide range of application of the Act of 1875—a most specific and particular remedial provision expressly intended to assist in the settlement of income and profits tax transactions between the taxpayer and the Government. See House of Representatives Report No. 767, 65th Congress, page 95, where the Ways & Means Committee in presenting this provision to Congress said—

“REFUNDS.

A new provision is incorporated in the bill providing that if upon examination of any return of income made pursuant to the income-tax provisions of the revenue act of August 5, 1909, or October 3, 1913, or the revenue acts of 1916 and 1917 or this act it appears that an amount of income, war profits, or excess-profits tax has been paid in excess of that properly due the amount of the excess so paid shall be credited against any income, war profits, or excess-profits taxes or installments thereof then due from the taxpayer under any other return and that any balance of

such excess *shall be immediately refunded* to the taxpayer. It is believed that this provision will materially assist in the settlement of transactions between the taxpayer and the Government.”

We are not sure and need not concede that these two statutes are even in contradiction, but if they are, then any conflict must be determined in favor of Sec. 284(a), upon which the judgment of the court below is based. It is familiar law that general and specific provisions in apparent contradiction, and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general. *Cook County National Bank v. United States*, 107 U. S. 445; *Townsend v. Little*, 109 U. S. 504; *United States v. Matthews*, 173 U. S. 381; *United States v. Mason*, 33 App. D. C. 350. A remedial statute must also be so construed as to afford the relief which the act indicates that the legislature intended to grant. *Logan v. Davis*, 233 U. S. 613; *Reagan v. District of Columbia*, 41 App. D. C. 409.

The *Cook County Bank* case, *supra*, was almost on all fours with the present case. There, as here, the United States was claiming under an older and general statute giving it priority as a creditor. The Supreme Court held, however, that the national banking act constituted a complete system for the establishment and government of national banks, and that the former law must yield to the section of the latter which provided for distribution of the entire assets of an insolvent bank with no provision for preference to any claim of the United States except in the single instance of advances to redeem the notes of the bank. The internal revenue laws are similarly a complete system like the national banking act and have long

been so recognized. *United States v. Pacific Railroad*, 4 Dill 66, Fed. Cas. No. 15983; *Fidelity & Columbia Trust Co. v. Lucas*, 7 F. (2d) 146, 148; cf. *Nicholl v. United States*, 7 Wall. 122.

VI. Conclusion.

The judgment of the court below should be affirmed with costs.

Respectfully submitted,

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